Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

DOLORES MURLIN-GARDNER,
Petitioner

v.

DEPARTMENT OF REVENUE–
COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

Ralph B. Pinskey, Esquire
PINSKEY & FOSTER
121 South Street
Harrisburg, PA 17101
(717) 234-9321
Fax (717) 234-7832
Attorneys for Petitioner

28 pp

QUESTIONS PRESENTED

1. Where a Title VII plaintiff suffers a hostile work environment caused by her supervisor in retaliation for opposing alleged sexual discrimination and sexual harassment by that supervisor, is it necessary for her to experience an adverse employment action in order for her to prevail on her retaliation claim?

2. To what extent must the Trail Court accept the credibility findings of a jury when deciding a Rule 59 Motion for a New Trial on the grounds that the verdict is against the weight of the evidence?

LIST OF PARTIES

The parties to this proceeding were Petitioner Dolores Murlin-Gardner and the Department of Revenue of the Commonwealth of Pennsylvania

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dolores Murlin-Gardner respectfully prays that a Writ of Certiorari issue to review the Judgement and Memorandum Opinion of the United States Court of Appeals for the Third Circuit entered in the above captioned proceeding on August 4, 1999. On September 3, 1999 said Court of Appeals denied Petitioner's request for a rehearing.

OPINIONS BELOW

The Judgement and Memorandum Opinion of the Court of Appeals for the Third Circuit, dated August 4, 1999 has not been reported. It is reproduced in Appendix "A" hereto.

The Order of the Court of Appeals for the Third Circuit, dated September 3, 1999, denying Rehearing has not ben reported. It is reproduced in Appendix "B" hereto.

The Order of the District Court, dated December 21, 1998, denying Petitioner's Motion for a Partial New Trial has not been reported. It is reproduced in Appendix "C" hereto.

STATEMENT OF BASIS OF JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on August 4, 1999. On September 3, 1999 said Court of Appeals entered an Order denying rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1)

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Fed. R. Civ. P. 59(a)

(a) **Grounds**. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

Constitution Of The United States, Amendment 7

Trial by Jury in Civil Cases

. . . and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

STATEMENT OF THE CASE

This is an employment discrimination case. The Petitioner in this case is Dolores Murlin-Gardner (herein sometimes called "Murlin-Gardner" or "Petitioner"). The Respondent is the Department of Revenue - Commonwealth of Pennsylvania (hereinafter sometimes called "The Department of Revenue" or "Respondent").

Petitioner Murlin-Gardner was employed by the Department of Revenue. She alleges that while she was in the employ of the Department of Revenue she was subjected to sexual discrimination and sexual harassment by her supervisor, Thomas Shaub, and when she made complaints about it to the Pennsylvania Human Relations Commission and to officials of the Department of Revenue she suffered retaliation from her supervisor.

On July 10, 1996 Petitioner filed a civil action in the United States District Court for the Middle District of Pennsylvania against the

Department of Revenue under Title VII of the Civil Rights Act of 1964.

At all times material herein Murlin-Gardner was employed by the Department of Revenue as a Clerk Typist III in the Bureau of Fiscal Management. In that position she was the personal secretary to the Bureau Director. In 1987 Murlin-Gardner made a complaint of sex and race discrimination against Thomas Shaub, who was then the Assistant Director of the Bureau of Fiscal Management. It was an internal complaint that she made to the Secretary of the Department of Revenue. The Secretary of Revenue referred Murlin-Gardner's complaint to his Personnel Director and his Affirmative Action Officer for investigation.

When Thomas Shaub learned that Murlin-Gardner had made that 1987 complaint of discrimination against him, he became very angry. Several disinterested employees in the Bureau of Fiscal Management distinctly heard him say:

> "I'm not worried about her. If she wants to play hardball, I'll play. She does not scare me."

Because of that specific comment, Thomas Shaub was formally counseled by the Personnel Director and the Affirmative Action Officer of the Department of Revenue not to do anything or say anything that could be interpreted as retaliation against Murlin-Gardner.

Notwithstanding statements received by the Personnel Director and the Affirmative Action Officer from other employees in Petitioner's Bureau confirming Murlin-Gardner's allegation that there was a hostile work environment in the Bureau of Fiscal Management caused by Thomas Shaub's attitude toward women and minorities, a report was issued jointly by the Personnel Director and the Affirmative Action Officer dismissing Petitioner's complaint as being unfounded and discrediting her allegations of harassment.

Murlin-Gardner testified that Thomas Shaub remained very

bitter toward her following her complaint to the Secretary of Revenue. Then, in 1988, after Shaub became the Bureau Director of the Bureau of Fiscal Management, and Petitioner's immediate supervisor, Shaub approached Murlin-Gardner and suggested that they call a "truce". Petitioner and Shaub talked and they decided to put everything behind them and to try to work as professionals. Their relationship did become "professional" and "business like" for a while.

In February of 1989, when the Purchasing Agent in the Bureau of Fiscal Management took a pregnancy leave, Thomas Shaub asked Murlin-Gardner to assume those duties in addition to her own secretarial duties. To induce Petitioner to continue performing the Purchasing Agent duties, Shaub made a promise to Murlin-Gardner that Petitioner interpreted as a promise of promotion.

After a time, when that promotion failed to materialize, Murlin-Gardner filed a grievance, hired a lawyer, and threatened to file a discrimination suit. Shaub admitted during trial that Petitioner had told him that she had hired a lawyer and was going to bring such a lawsuit.

Murlin-Gardner testified that Shaub told her to drop her grievance. He threatened to "black ball" her. He said that she would regret the day that she sued him. He said that "the State never loses". He bragged that he was "Revenue."

In December of 1989, Murlin-Gardner actually filed a complaint of discrimination with the Pennsylvania Human Relations Commission.[1] Her complaint alleged that she was denied a promotion because of her race and sex. Thomas Shaub was aware that Petitioner had made this complaint to the Pennsylvania Human Relations Commission because he attended one of their fact-finding sessions.

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[1] That discrimination complaint was cross-filed with the Equal Employment Opportunity Commission.

Murlin-Gardner testified that after she filed her complaint with the Human Relations Commission, Thomas Shaub stopped treating her in a professional manner. She said that Shaub would not give her work; he would not talk with her; he even would tell her things and then deny that he said them.

Murlin-Gardner stated that she bid on about 117 positions in order to get away from Mr. Shaub. Petitioner said that she was not successful on any of her bids -- no one would take her.

Then, in June of 1990 Thomas Shaub told Murlin-Gardner that he was going to send her down to the Bureau of Data Reduction, which he referred to as "The Zoo". Shaub said to Petitioner that in the Bureau of Data Reduction she would be regimented as if she were in the military and stripped of her dignity. He also told her that in the Bureau of Data Reduction she would have to pay for water and other amenities that she received for free in the Bureau of Fiscal Management. Murlin-Gardner later accepted assignment to the Bureau of Data Reduction just to get away from Thomas Shaub.

Murlin-Gardner suffered severe health problems as a result of her treatment in the Department of Revenue. She stopped working for the Department of Revenue on the advice of her doctors.

Trial commenced in the District Court on September 10, 1998, and concluded on September 14, 1998 with a defense verdict for the Department of Revenue. On September 24, 1998 Petitioner Murlin-Gardner filed a Motion for a Partial New Trial on the issue of whether Thomas Shaub (her supervisor) retaliated against her for threatening to file and actually filing a complaint of discrimination. Petitioner claimed that the Jury's verdict on this issue was against the weight of the evidence. On December 21, 1998 the District Court entered an Order denying Murlin-Gardner's Motion for a Partial New Trial. Subsequently, Petitioner timely appealed to the Court of Appeals.

The basis of federal jurisdiction in the District Court was 42 U.S.C. §2000e-5(f)(3) (jurisdiction over actions filed under Title VII

of the Civil Rights Act of 1964) and 28 U.S.C. §1331 (federal question jurisdiction).

REASONS FOR GRANTING WRIT

In his Order denying Petitioner's Motion for a Partial New Trial on her contention that her supervisor retaliated against her in 1989 and 1990, the District Judge stated:

> "We agree with the defendant that even if her view of the evidence is correct, plaintiff did not suffer an adverse employment action, as that term is defined in Title VII law, and has no claim for retaliation."

Where a supervisor created a hostile work environment after a Title VII plaintiff opposes alleged sexual discrimination and sexual harassment by that supervisor, it should not be necessary for the plaintiff to experience an adverse employment action in order to prevail on her retaliation claim.

In Burlington Industries Inc. v. Ellerth, 524 U.S. 742, ___, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, ___, 118 S. Ct. 2275, 2292-93, 141 L. Ed. 2d 662 (1998) this Court held that an employer is vicariously liable for a supervisor's sexual harassment of an employee when the harassment results in a tangible employment action, such as discharge, undesirable reassignment, or demotion.

This Court also held that absent a tangible employment action, the employer will be vicariously liable to the employer for an actionable hostile work environment, unless the employer can prove by a preponderance of the evidence a two-part defense: a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and b) that the plaintiff employee unreasonable failed to take advantage of any preventive or corrective opportunities by the employer or to avoid the harm otherwise. Ellerth, 524 U.S. at ___, 118 S. Ct. at 2270; Faragher, 524 U.S. at ___, 118 S. Ct. at 2293

We can perceive no reason why the holdings of Ellerth and Faragher should not apply to a hostile work environment created in retaliation for opposing alleged sexual discrimination or sexual harrassment. Very often it is an employee's opposition to sexual discrimination or harassment that triggers a hostile environment.

This brings us to the second issue. To what extent must the Trial Court accept the credibility findings of a jury when deciding a Rule 59 Motion for a New Trial on the grounds that the verdict is against the weight of the evidence?

The Trial Judge's Opinion states that:

> "We also agree that in connection with [Murlin-Garnder's] contentions concerning retaliation, the jury simply resolved credibility issues in the case in defendant's favor."

Similarly, the Court of Appeals in its Memorandum Opinion stated that:

> "Finally, Murlin-Gardner appeals the denial of her motion for a partial new trial. Looking at the evidence in the light most favorable to the Department [of Revenue], the prevailing party, it is clear the jury's conclusion was not against the weight of the evidence. To the extent that there was conflicting testimony, the jury obviously resolved the credibility issues in the Department's favor."

It is Petitioner's contention that when the court "weighs the evience" pursuant to a Rule 59 Motion for a new trial, it must do something more than simply "rubber stamp" the jury's credibility findings.

The Reexamination Clause of the Seventh Amendment is not an absolute prohibition against re-examining determinations made by a jury.

In Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 432-33, 116 S. Ct. 2211, 2222, 135 L. Ed. 2d 659 (1996) this Court said:

> "* * * In keeping with the historic understanding, the Reexamination Clause does not inhibit the authority of trial judges to grant new trials 'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .' ('The power of the English common law courts to grant a new trial for a variety of reasons with a view to the attainment of justice was well established prior to the establishment of our Government.') . . . ('The exercise of [the trial court's power to set aside the jury's verdict and grant a new trial] is not in derogation of the right of trial by jury but one of the historic safeguards of that right.' . . . ('[I]f it should appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excess in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case') 'The trial judge in the federal system', we have reaffirmed, 'has . . . discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence.' . . . This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." (Citations omitted)

If the Trial Court need not give the same degree of scrutiny to factual determinations made by a jury as it must give to damage determinations, then that means that there are two rules for weighing the evidence: one rule for liability and one rule for damages. The majority in the Gasperini case specifically rejected such a two rule approach. 518 U.S. at 438, f.n. 23, 116 S. Ct. at 2225, f.n. 23.

Some Circuits have specifically endorsed the Trial Court's right to "weigh" for itself all of the evidence, including the credibility of

witnesses.

In Thomas v. Slater, 20 F. 3rd 298, 304 (7th Cir. 1994) the Seventh Circuit said:

> "In deciding to grant a new trial [the District Court] was entitled to weigh the evidence for itself. 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §2806, at 44-45 (1973). In weighing the evidence, the court may assess the witnesses' credibility. See Whalen v. Roanoke County Bd. of Supervisors, 769 F. 2d 221, 226 (4th Cir. 1985), overruled on reh'g on other grounds by 797 F. 2d 170, 171 (4th Cir. 1986) (per curiam) (en banc)."

Also, in Bevevino v. Saydjari, 574 F. 2d 676, 683-84 (2nd Cir. 1978) the Second Circuit said:

> "Unlike a motion for judgment notwithstanding the verdict, a new trial may be granted even if there is substantial evidence to support the verdict. 11 C. Wright & A. Miller, supra, §2806, at 43 The trial judge is free to weigh the evidence and need not view it in the light most favorable to the verdict winner. Id. at 44-45"

The Thomas case decided by the Seventh Circuit and the Bevevino case decided by the Second Circuit would seem consistent with the holding of Gasperini.

Here, it is not clear whether the jury found no liability on Murlin-Gardner's retaliation claim because it did not believe Thomas Shaub committed the acts which Petitioner alleged that he did, or because it did not believe those acts amounted to a tangible employment action, or both.

Although Thomas Shaub denied retaliating against Murlin-Gardner, he was angry after she made her first complaint to the

Secretary of the Department of Revenue and he was overheard by several disinterested employees to say:

> "I am not worried about her. If she wants to play hardball, I'll play. She does not scare me."

This comment shows a mind capable of retaliation. The Department of Revenue was concerned enough about this comment that the Personnel Director and the Affirmative Action Officer personally cautioned Shaub not to do anything or say anything that could be interpreted as retaliation against Murlin-Gardner.

Other employees in the Bureau of Fiscal Management have heard Thomas Shaub make racist and sexist remarks. One employee heard Shaub say "that's dumb" or "that's stupid" after Murlin-Gardner had said something. Shaub admitted to calling Murlin-Gardner an "air head". Another employee overheard Shaub make the comment, "Who cares what she thinks, she is a woman".

Thomas Shaub admitted that Murlin-Gardner told him that she had hired a lawyer and was going to bring a lawsuit. Although Shaub denied ever telling Murlin-Gardner that he was going to send her to the "Zoo", he did admit to referring to the Bureau of Data as being the "Zoo". Shaub denied ever withholding work from Murlin-Gardner, but Respondent never introduced at trial examples of her work to show what Shaub had assigned to her. In fact, he denied that there had been any problems between him and Murlin-Gardner, when the investigation report of the Personnel Director and the Affirmative Action Officer clearly showed that they had serious problems getting along. Murlin-Gardner testified that she bid on about 117 positions in order to get away from Mr. Shaub, but no one would take her. Here, she was an experienced secretary to a Bureau Director, but no one wanted her. The obvious inference to be drawn is that Thomas Shaub "black balled" her, just as he promised to do. The Department of Revenue offered no explanation why an experienced secretary like Murlin-Gardner had such a difficult time trying to transfer out of the Bureau of Fiscal Management to another position.

CONCLUSION

In conclusion, this Court should issue a Writ of Certiorari because it will give the Court the opportunity to clarify its Ellerth and Faragher decisions with respect to whether they also apply to Title VII "retaliation" claims. And, it will also give this Court the opportunity to decide whether the Gasperini decision is limited simply to the issue of excessive damages or equally applicable to issues of liability.

Ralph B. Pinskey
PINSKEY & FOSTER
121 South Street
Harrisburg, PA 17101
(717) 234-9321
Fax (717) 234-7832
Attorneys for Petitioner

APPENDIX "A"

UNREPORTED -NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-7036

DOLORES MURLIN-GARDNER,
Appellant

v.

DEPARTMENT OF REVENUE-
COMMONWEALTH OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 96-cv-01218)

District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34.1(a)
July 27, 1999

BEFORE: SLOVITER, NYGAARD and McKEE, Circuit Judges.
(Filed August 4, 1999)

MEMORANDUM OPINION OF THE COURT

NYGAARD, Circuit Judge.

This appeal is from a Summary Judgment granted to the defendant/employer, the Pennsylvania Department of Revenue, in an employment discrimination lawsuit, brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e through 2000e-4, by appellant, Dolores Murlin-Gardner. She raises the following issues:

1. Whether the District Court abused its discretion by excluding evidence pertaining to Murlin-Gardner's workers' compensation claim?

2. Whether the District Court correctly granted summary judgment to the Department on the issue of Murlin-Gardner's separation from employment in 1993?

3. Whether the District Court correctly denied Murlin-Gardner's motion for partial new trial?

We conclude that the District Court did not err, and will affirm.

I. Background[1]

Murlin-Gardner, a white female, began her employment with Defendant in 1984 as a Clerk Typist I in the Bureau of Data Reduction. In 1985, she was promoted to Clerk Typist III, and became secretary to the Director of the Bureau of Fiscal Management. The Director of the Bureau was, as of January of 1988, Thomas Shaub.

1. Temporary Work as Purchasing Agent I

In 1989, Murlin-Gardner was temporarily assigned to the position of Purchasing Agent I within the Bureau of Fiscal Management, to fill in for a Purchasing Agent who was on leave. Murlin-

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[1] Taken in substantial measure from the Opinion of the District Court

Gardner alleges that during this period Shaub repeatedly promised her that she would receive a promotion to the salary status of a full-time Purchasing Agent 1. She was not promoted, and Murlin-Gardner alleges that Shaub misled her regarding the impending promotion, and failed to promote her, because of her race and gender.

2. Retaliatory Harassment

In June and July of 1989, Murlin-Gardner complained to Department managers that she was a victim of race and sex discrimination. Murlin-Gardner alleges that in August of 1989, Shaub told her that the Department would not remedy her alleged salary inequity bebecause she had retained an attorney. Murlin-Gardner also alleges that Shaub began to harass her at this time, and continued to harass her until she was transferred from the Bureau of Fiscal Management.

3. Transfer to the Bureau of Data Reduction

On July 16, 1990, Murlin-Gardner met with the Deputy Secretary of Administration, Mr. Harris, to request a transfer out of Shaub's line of supervision. Transfers within the Department of Revenue, as well as transfers from the Department to another agency, are the responsibility of the employee seeking the transfer; the employee must identify and pursue the new position herself. The Department advised Murlin-Gardner that to obtain a transfer, she would have to find an appropriate vacancy and apply.

On September 21, 1990, Murlin-Gardner met with Harris and John Greecher, Director of Personnel. At this meeting, she complained that people in her office were treating her unfairly, in retaliation for her prior complaints. Murlin-Gardner refused, however, to provide any details concerning the alleged mistreatment. This September 21 meeting was the first time Murlin-Gardner had complained to the Department of retaliation.

Murlin-Gardner met with Harris and Greecher again on October 17, 1990. At this meeting, Murlin-Gardner reiterated her desire to be transferred. Murlin-Gardner's health was allegedly suffering as a result of the stress caused by working for Shaub. Following the October 17 meeting, the Department decided to offer Murlin-Gardner a Clerk Typist III position in the Bureau of Data Reduction. As this position offered the same classification level as that held by Murlin-Gardner in the Bureau of Fiscal Management, it constituted a transfer and not a demotion, with no effect on Murlin-Gardner's classification, pay, or seniority. The Department formally offered Murlin-Gardner the transfer to the Bureau of Data Reduction on October 25, 1990, and Murlin-Gardner accepted.

Murlin-Gardner alleges, in contrast, that her transfer to the Bureau of Data Reduction was a de facto demotion. She claims that the working conditions in Data Reduction were considerably worse than those is Fiscal Management, and that Shaub told her that she must either accept the transfer or resign.

4. Murlin-Gardner's Treatment in Bureau of Data Reduction

Murlin-Gardner alleges that at the Bureau of Data Reduction, she was subjected to harassment by her supervisor, Ann Feeney. This harassment allegedly included:

> malicious denials of sick leave and leave without pay, being paid the lowest annual salary of all the word processors, an unwarranted disciplinary suspension, disparate picayune treatment concerning work hours and degrading public scoldings and ridicule.

a. Pay

Murlin-Gardner received the same salary after having been transferred to the Bureau of Data Reduction that she had received while

working in the Bureau of Fiscal Management. Murlin-Gardner's co-workers in the Bureau of Data Reduction, were, like Murlin-Gardner, classified as Clerk Typist III. All of these co-workers had more years of service than Murlin-Gardner, however, and therefore were paid a higher salary than Murlin-Gardner, in accordance with salary steps on the established pay schedule.

b. Leave

Employee leave within the Department of Revenue is governed by a collective bargaining agreement. The relevant terms of this agreement are set forth in a Leave Manual which is distributed to all employees. Under the agreement all requests for leave, with or without pay, require the approval of the Department. The grant of leave without pay for periods under two weeks in length is at the discretion of the Department, which has no obligation under the agreement to grant such requests. The grant of leave is in all events subject to the Department's need to maintain sufficient operations. An employee is considered to have abandoned her employment after she is absent without leave for five or more consecutive work days.

When Murlin-Gardner arrived in the Bureau of Data Reduction in October of 1990, she had a negative leave balance of -25.60 hours of annual leave and -14.55 hours of sick leave, and a personal leave balance of zero. Murlin-Gardner was granted additional short-term leave in November and December of 1990. As of January 1, 1991, Murlin-Gardner had a negative leave balance of -6.98 hours of annual leave and -2.78 hours of sick leave, and a personal leave balance of zero.

On April 22, 1991, Murlin-Gardner requested a six-week leave without pay to assist her daughter in making "career decisions." The Department denied this request. As of January 1, 1992, Murlin-Gardner had a positive leave balance of 8.39 hours annual leave, zero hours of personal leave, and 2.22 hours of sick leave. Throughout 1992

and early 1993, Murlin-Gardner missed work on numerous occasions due to illness, medical appointments, family medical care, and for a traffic hearing. Although Murlin-Gardner did not have sufficient accumulated leave to cover these absences, the Department regularly permitted Murlin-Gardner to apply annual and personal leave to cover what would normally be considered sick leave, to anticipate future unearned leave, and on several occasions to take leave without pay.

On July 10, 1992, Murlin-Gardner had exhausted all of her annual leave and sick leave for the 1992 calendar year. The Department therefore provided her with a leave status memo, advising her of this fact, and informing her that requests for leave without pay would be granted at the Department's discretion, and only in the most compelling circumstances. The memo advised Murlin-Gardner that absence from work without leave could make her subject to disciplinary action.

During the weeks immediately following July 10, 1992, the Department granted Murlin-Gardner's requests for leave without pay on several occasions. Beginning on September 23, 1992, however, the Department began denying Murlin-Gardner's requests for her absences from work to be treated as leave without pay; Murlin-Gardner was therefore deemed absent without leave on numerous occasions throughout the remainder of 1992. However, Murlin-Gardner was not disciplined for these absences.

5. Purchasing Agent I Vacancy

In April of 1991, a Purchasing Agent I position in the Bureau of Fiscal Management became vacant. Murlin-Gardner applied for the position on May 10, 1991.

A Purchasing Agent I's duties are technical, in contrast with the clerical duties of a Clerk Typist III. The Purchasing Agent position required as minimum qualifications three years of experience in pur-

chasing or four years of experience in stores or warehousing with equivalencies. Murlin-Gardner's sole experience in purchasing was the eight to nine months she spent temporarily acting as a Purchasing Agent I in 1989. The Department awarded the Purchasing Agent I position to Sheila Craigwell, an African-American female with approximately six years of experience working as a Purchasing Agent II with the Pennsylvania Fish and Boat Commission.

6. Murlin-Gardner's Departure from the Department of Revenue

Due to recurring medical problems, Murlin-Gardner exhausted all of her available leave for the calendar year 1993 by February 17, 1993. From February 17 through August 19, 1993, Murlin-Gardner was on a six-month leave without pay, based on written requests and appropriate physician certificates. For Murlin-Gardner to be entitled to an additional six months of leave without pay (following her February to August leave), she was required to submit a request and a doctor's certificate. Murlin-Gardner failed to submit such a request, and did not return to work. She was therefore determined to have abandoned her employment. Murlin-Gardner's status as an employee of the Department of Revenue therefore ceased on August 19, 1993.

III. Discussion

First, Murlin-Gardner appeals the exclusion of evidence relating to the findings in her prior workers' compensation claim. She claims that the workers' compensation decision should have been given preclusive effect in this case. We have held that factual determinations made in workers' compensation claims are inadmissible in subsequent Title VII cases. See Dici v. Commonwealth of Pennsylvania, 91 F.3d 542 (3d Cir. 1996). In addition, Pennsylvania's Commonwealth Court -- the only Pennsylvania court to specifically consider the issue-preclusive effect between Title VII and workers' compensation cases -- agreed with our opinion in Dici on the inadmissibility of prior factual findings. Consolidation Coal Company v. Workers' Compensation

Appeal Board, 1999 WL 126119 (Pa. Commw. Ct. March 11, 1999). Murlin-Gardner's reliance on the Pennsylvania Supreme Court's decision in Rue v. K-Mart Corp., 713 A.2d 82, 87 (Pa. 1998), is unavailing because the court specifically stated that the holding had no effect on cases dealing with workers' compensation. See Id. at 87 n.4. Thus, we find no merit in this allegation of error.

In Murlin-Gardner's second issue she appeals the granting of summary judgment for the Department on the issue of her separation from employment in 1993. She argues that the District Court erred by concluding that she was not terminated from the Department in 1993 in retaliation for her past complaints of harassment. The District Court found that Murlin-Gardner had set forth a prima facie case of retaliatory termination, but concluded that the Department has met its burden under the McDonnell-Douglas shifting burden test by demonstrating a legitimate, non-discriminatory reason for the severance of Murlin-Gardner's employment. Contrary to clearly established and plainly expressed Department policy under the collective bargaining agreement, the Department asserts that Murlin-Gardner failed to request additional leave without pay to support her continued absence from work. Under Department policy, Murlin-Gardner was therefore deemed to have abandoned her employment. The material facts -- which were admitted by Murlin-Gardner -- demonstrate that she, in fact, had abandoned her employment and voluntarily resigned from the Department. Murlin-Gardner never provided medical documentation to justify additional leave as she was required to do under the collective bargaining agreement. Therefore, the Department was justified in concluding that she had abandoned her position and had resigned. This proffered justification constitutes a legitimate, non-retaliatory reason for her termination.

The burden then shifted back to Murlin-Gardner to show that the Department's explanation was pretextual. Bray, 110 F.3d at 990. Murlin-Gardner has not provided this Court, nor did she provide the District Court, with any evidence that would indicate that the Depart-

ment's decision was pretextual. Summary judgment in favor of the Department on Murlin-Gardner's claims arising from the conclusion of her employment in 1993 was therefore appropriate.

Finally, Murlin-Gardner appeals the denial of her motion for partial new trial. Looking at the evidence in the light most favorable to the Department, the prevailing party, it is clear that the jury's conclusion was not against the weight of the evidence. To the extent there was conflicting testimony, the jury obviously resolved the credibility issues in the Department's favor. Murlin-Gardner's request for a partial new trial was appropriately denied.[1]

III. Conclusion

In sum, we have carefully considered the arguments of Murlin-Gardner, and find them to be without merit. We will affirm.
TO THE CLERK:

Please file the foregoing opinion.

/s/ Richard L. Nygaard
Circuit Judge

Dated: August 4, 1999

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[1] We note that, in her reply brief, Murlin-Gardner withdrew her contention that the District Court erred by denying her motion to amend her amended complaint to add claims under the Pennsylvania Human Relations Act. It is clear that the Eleventh Amendment barred the PHRA claims. See Boykin v. Bloomsburg Univ., 893 F. Supp. 378, 394 (M.D. Pa. 1995), aff'd, 91 F.3d 122 (3d Cir. 1996) (memorandum opinion).

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-7036

DOLORES MURLIN-GARDNER,
Appellant

v.

DEPARTMENT OF REVENUE-
COMMONWEALTH OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 96-cv-01281)
District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34. 1 (a)
July 27, 1999

BEFORE: SLOVITER, NYGAARD and McKEE, Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34. 1 (a) on July 27, 1999.

On consideration whereof it is now ordered and adjudged by this court that the judgment of the district court entered on September 16, 1998, is hereby **AFFIRMED**.

Costs taxed against appellant.

ATTEST:

/s/ P. Doulgas Sisk
Clerk

Date: August 4, 1999

APPENDIX "B"

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-7036

DOLORES MURLIN-GARDNER

v.

DEPARTMENT OF REVENUE-
COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 96-cv-01281)

SUR PETITION FOR PANEL REHEARING

BEFORE:
SLOVITER, NYGAARD, and MCKEE, Circuit Judges

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of the this court, and no judge who concurred in the decision having asked for rehearing is hereby **DENIED.**

By the Court,

/s/ Richard L. Nygaard
United States Circuit Judge

Dated: Sep. 3, 1999

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DOLORES MURLIN-GARDNER, Plaintiff	:	
vs	:	CIVIL ACTION NO. 1:CV-96-1281
DEPARTMENT OF REVENUE, COMMONWEALTH OF PENNSYLVANIA, Defendant	:	

ORDER

AND NOW, this 21st day of December, 1998, upon consideration of the arguments submitted by the litigants, plaintiff's motion for a partial new trial, filed September 24, 1998 (doc. no. 105), is denied.

Plaintiff seeks a new trial on her contention that her superior retaliated against her in 1989 and 1990. We agree with the defendant that even if her view of the evidence is correct, Plaintiff did not suffer an "adverse employment action," as that term is defined in Title VII law, and has no claim for retaliation. We also agree that in connection with her contentions concerning retaliation, the jury simply resolved the credibility issues in the case in defendant's favor. This result was no doubt based upon the considerable testimony that contradicted her complaints.

/s/ WILLIAM CALDWELL
William W. Caldwell
United States District Judge